

August 4, 2016

VIA ECFS

EX PARTE NOTICE

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *In the Matter of Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, WC Docket No. 16-106

Dear Ms. Dortch,

On August 2, 2016, Nick Alexander of Level 3, Gegi Leeger of XO Communications, Ivana Kriznic of Orange Business Services US, Inc., Linda Cicco and Sarah Fink of BT, Michelle Rosenthal and Chris Koegel of T-Mobile, and Angie Kronenberg, Wade Meena, and the undersigned counsel of INCOMPAS (collectively, the “INCOMPAS Representatives”) met with Lisa Hone, Daniel Kahn, Brian Hurley, Bakari Middleton, Gail Krutov, and Brad Bourne of the Wireline Competition Bureau to discuss INCOMPAS’s comments on the Notice of Proposed Rulemaking in the above-referenced docket. Melissa Kinkel and Heather Hendrickson of the Wireline Competition Bureau participated by phone.

The INCOMPAS Representatives urged the Commission to adopt the distinction it has drawn in this proceeding between mass market and business customers in its definition of broadband Internet access services (“BIAS”) in the larger context of Section 222.¹ To that end, INCOMPAS proposed that the Commission exempt business customers from subpart U of the Commission’s rules,² allowing the plain language of Section 222 to govern those relationships. The Commission’s Notice of Proposed Rulemaking (“NPRM”) asserts that BIAS is a mass market retail service and that proposed rules would apply only to mass market customer relationships.³ The INCOMPAS Representatives proposed that the Commission adopt the same approach in the context of customer proprietary network information (“CPNI”). Carriers operating under the current framework find it burdensome to administer the rules, adopted with

¹ 47 U.S.C. § 222.

² 47 CFR § 64.2001 et seq.

³ See Protecting the Privacy of Customers of Broadband and Other Telecommunications Services, Notice of Proposed Rulemaking, WC Docket No. 16-106, FCC 16-39, at 12, ¶ 29 (rel. Apr. 1 2016). We observed that small businesses purchasing BIAS would be covered by the FCC’s proposed rules.

the intent of protecting individual, mass-market customers, while finding that business customers often are confused by and enjoy no benefit from those rules. We stated that Section 222 provides a solid legal foundation for the relationship between carriers and sophisticated business customers that are regularly able to negotiate service terms on matters including privacy and security. Exempting business customers from CPNI requirements would have a number of policy benefits including facilitating the technology transitions by eliminating arbitrary and difficult to administer categories of service from the total service approach and allowing carriers to compete by offering innovative pro-customer options and contracts that meet business customers' privacy and data security expectations.

If the Commission chooses not to adopt the approach outlined above and elects to harmonize the rules for voice services with the proposed rules for BIAS providers, the INCOMPAS Representatives suggested that the result must honor the existing, private sector practices telecommunication carriers use to protect customer proprietary information ("CPI"). We urged the Commission to maintain the flexibility in the current rules and policies that provide for exemptions or alternative arrangements with business customers.⁴ Harmonization that reconciles the disparities between current practices and the proposed rules will create benefits for customers and telecommunications carriers, including limiting customer over-notification, streamlining administrative procedures, and removing overlap between services. However, as presented, the current harmonization proposal could potentially disrupt policies and practices that already comply with CPNI rules in the areas of notice, customer approval, data security, and data breach notification.

With respect to the proposed notice requirements, INCOMPAS Representatives explained the association's member companies have established CPNI practices and policies that provide their voice customers with clear and conspicuous information about their privacy practices, but that the Commission's proposed definitions of "customer" and "personally identifiable information" ("PII") were overly broad and will create industry confusion. We noted that the NPRM makes no delineation between "sensitive" and "non-sensitive" PII and indicated this could lead to an increase in customer breach notifications leading to customer confusion, notice fatigue, and decreased confidence in their telecommunications service. The INCOMPAS Representatives also reported that most carriers make their privacy policy consistently available on company websites, that consumers know where to find these policies, and that carriers should be allowed to provide meaningful notice of their policies using existing practices. This would eliminate administrative burdens related to making the policy available prior to a retail sale or over the phone as proposed in the NPRM and would allow consumers to review the policy at a time when they can give their full attention to it.

Under the current customer approval framework, voice providers have the opportunity to provide new and innovative services to mass market and business customers as they become available through an opt-out regime. The INCOMPAS Representatives emphasized that carriers and customers will be better served by a more flexible regime, instead of the proposed communications-related services marketing and use restrictions, which recognizes that BIAS is frequently bundled with traditional local, long distance, and wireless service. Rather the

⁴ See, e.g., 47 CFR § 64.2010(g) (describing the business customer exemption allowing telecommunications carriers to contract for authentication regimes other than those described).

Commission should abandon the total services approach or re-examine what qualifies as the same category of service. We also advocated for the approach supported by the Federal Trade Commission (“FTC”) in its comments, which would reserve opt-in requirements for the use of sensitive data that would surprise consumers.

As to data security protections, the INCOMPAS Representatives argued that carriers should be allowed to negotiate individually tailored data security provisions with their customers within the framework provided by the plain language of Section 222. The business customer exemption and the one-for-one user and account system are examples of areas where carriers have successfully negotiated security arrangements with business customers. We further noted that INCOMPAS member companies should not be required to disclose their security practices as any public disclosure could potentially compromise these protocols. We also suggested that the Commission limit any mandates on encryption technologies or any other technology-specific requirements for securing data. Many of these technologies could become outdated several years from now, and companies should be able to pivot to new methods for securing data as they become available. Further, encryption currently is only one component of the data security protocols that telecommunications carriers use to secure privacy, and the Commission would be best served by allowing companies to employ and customize the data security program that most effectively services the needs of its customers.

In terms of data breach notification requirements, the INCOMPAS Representatives discussed scenarios in which the proposed rules would lead to an increase in data breach incidents and required notifications. The proposed rules provide more opportunities for carriers to inadvertently share or make use of linked or linkable information and increase the likelihood that notices will be sent to customers when no actual harm has occurred. We indicated that customers would be better served by breach notification requirements that are triggered by a risk of harm. We also provided detailed information on member companies’ experiences with data breaches and indicated that the proposed timeline for notification of customers would not provide carriers with enough time to contain the breach, conduct comprehensive investigations, identify affected customers, put remedies in place, and send notifications.

Finally, the INCOMPAS Representatives expressed support for commenters that encouraged the Commission to clarify that telecommunications carriers are permitted to share CPNI under 222(d)(2).⁵ This practice will protect consumers from abusive, fraudulent, or unlawful activities, such as robocalls, and the Commission should encourage carriers to participate in CPNI information-sharing during investigations of abusive or fraudulent behavior.

⁵ See Comments of United States Telecom Association, WC Docket No. 16-106, at 16 (filed May 27, 2016); *see also* Comments of CTIA, WC Docket No. 16-106, at 139 (filed May 26, 2016).

Pursuant to Section 1.1206 of the Commission's Rules, a copy of this letter is being filed electronically in the above-referenced docket. Please do not hesitate to contact me if you have questions about this submission.

Respectfully submitted,

/s/ Christopher L. Shipley

Christopher L. Shipley
Attorney & Policy Advisor
(202) 872-5746

cc: Lisa Hone
Daniel Kahn
Brian Hurley
Bakari Middleton
Melissa Kinkel
Heather Hendrickson
Gail Krutov
Brad Bourne